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No. 10-977

Supreme Court, U.S.
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In The
Supreme Court of the United States

CAPITAL ONE BANK (USA), N.A.,

Petitioner,

v.

RAQUEL RUBIO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Defendant-Petitioner, throughout its brief, ignores two fundamental aspects of the decision below, namely, (1) that the decision of the Ninth Circuit Court of Appeals reversed a district court's *grant of a Fed. R. Civ. P. 12(b)(6) motion to dismiss* Plaintiff-Respondent's Second Amended Complaint; and (2) that the issue below was whether the use of the word "fixed" in the credit card solicitation at issue was sufficiently clear at the time that it was made that a court could determine, as a matter of law, that it was not misleading. Thus, Defendant-Petitioner phrases the question presented completely backwards, as if Defendant-Petitioner was appealing a grant of summary judgment in Plaintiff-Respondent's favor. The true question presented, which is the same question answered by the Ninth Circuit below, is as follows:

Whether, at the motion to dismiss stage, a description of an interest rate as "fixed" in a credit card solicitation, when the issuer simultaneously reserves the right to change such rate at whim, is so "clear" and written in such a "reasonably understandable form" that, as a matter of law, it cannot be misleading.

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INTRODUCTION

In 2008, Plaintiff-Respondent Raquel Rubio filed a Second Amended Complaint ("Complaint") in the United States District Court, Central District of California, against Defendant-Petitioner Capital One Bank (USA), N.A. ("Capital One"), which included a claim for violation of the federal Truth in Lending Act ("TILA"). The basis of Ms. Rubio's claim under TILA was that Capital One's use of the term "fixed" in the "Schumer Box" disclosure section of a credit card solicitation that she received in 2004, which described the Annual Percentage Rate ("APR") for the credit card being offered to her, was not "clear and conspicuous" under TILA and Regulation Z, because Capital One simultaneously reserved the right to change the APR on Plaintiff-Respondent's credit card at any time and for any reason. In analyzing this claim, at the motion to dismiss stage, the district court found that the credit card solicitation's APR disclosure in this manner was so clear and conspicuous that it could not be misleading as a matter of law, and dismissed Ms. Rubio's Complaint.

On July 21, 2010, the Ninth Circuit Court of Appeals issued its opinion reversing the district court's grant of Petitioner's motion to dismiss. The court of appeals held that Respondent had stated a claim under TILA because a reasonable person could view the "fixed 6.99% APR" language in Petitioner's solicitation as misleading where Petitioner had actually reserved the right to change such APR at any time and for any reason. The Ninth Circuit's decision

that Petitioner cannot show, *as a matter of law*, that the particular disclosure it made in this instance was so "clear and conspicuous" that it could not be misleading, was consistent with decisions from other circuits analyzing similar TILA claims under Regulation Z. *Rubio v. Capital One Bank*, 613 F.3d 1195 (9th Cir. 2010).

Petitioner asked for a panel rehearing and a rehearing *en banc*. Petitioner presented essentially the same arguments for the panel rehearing and rehearing *en banc* as it does here, namely, (1) that there was supposedly a circuit conflict deepened by the Ninth Circuit panel's decision that needed to be addressed by *en banc* review, and (2) that the panel's decision erroneously retroactively applied a 2009 TILA amendment to Respondent's claim. The Ninth Circuit did not find those arguments persuasive, and Petitioner's requests for panel rehearing and rehearing *en banc* were denied on September 29, 2010. Respondent respectfully requests that this Court do the same, and deny the petition, as neither of the reasons articulated by Petitioner support further review by this Court.

First, Petitioner contends that review by this Court is warranted because, according to it, there is a "three-way conflict" concerning the appropriate analysis of the "clear and conspicuous" disclosure requirement contained in TILA. Petitioner, however, selectively picks and chooses the cases, and the language from those cases, on which it seeks to base such conflict. A detailed review of the case law reveals

that the supposed conflict is actually illusory and that the Ninth Circuit's decision below is fully consistent with the reasoning and holdings of the various other circuits that have addressed this issue.

The Ninth Circuit, consistent with prior case law that reviewed the Schumer Box[1] requirements, appropriately relied on the staff commentary interpreting the "clear and conspicuous" language of 15 U.S.C. § 1632(a) and 12 C.F.R. § 226.5(a)(1) in relation to Regulation Z, namely, that such disclosures must be made "in a reasonably understandable form and readily noticeable to the consumer." 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1; *Rubio*, 613 F.3d at 1200; *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260, 263 (3d Cir. 2003); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) ("Unless demonstrably irrational, Federal Reserve Board staff opinions construing [TILA] or Regulation [Z] should be dispositive.") Thus, the Ninth Circuit held, consistent with prior case law, that "Regulation Z prohibits a Schumer Box from making 'misleading' APR disclosures, where 'misleading' means a disclosure that a reasonable

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[1] TILA requires that all direct-mail credit card solicitations disclose, among other things, the APR applicable to credit extended by a credit card issuer such as Capital One. *See* 15 U.S.C. § 1637(c); 12 C.F.R. § 226.5a. The APR disclosure in a credit card solicitation must be made "in the form of a table." 15 U.S.C. § 1632(c)(2)(A), 12 C.F.R. § 226.5a. This table is commonly referred to as the "Schumer Box." *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260, 263, fn. 1 (3d Cir. 2003).

consumer will either not understand or not readily notice." *Rubio*, 613 F.3d at 1200.[2]

The specific truth in lending issue the Ninth Circuit analyzed in this case dealt with the adequacy of Petitioner's APR disclosure. As the Ninth Circuit succinctly states: "The Schumer Box and the paragraph linked to it by an asterisk described the APR as 'fixed' and listed only three events under which the APR could increase. We conclude that Capital One cannot show that, as a matter of law, this disclosure is clear and conspicuous," where "the creditor has reserved the right to change the APR for any reason." *Rubio*, 613 F.3d at 1200, 1202. The Ninth Circuit's holding is non-controversial. Regulation Z specifically provides that the APR disclosure in a credit card solicitation "shall reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c). Thus, the Ninth Circuit reversed the district court's grant of Petitioner's motion to dismiss on that issue.

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[2] Courts from every circuit have consistently held that the analysis of the adequacy of TILA disclosures is an objective test from the point of view of a reasonable consumer. *See, e.g.*, *Roberts*, 342 F.3d at 262, 266, 267; *Palmer v. Champion Mortg.*, 465 F.3d 24, 28 (1st Cir. 2006) (test is "whether the average consumer, looking at the Notice objectively, would find it confusing"); *Lifanda v. Elmhurst Dodge*, 237 F.3d 803, 806 (7th Cir. 2001) ("our task is to determine whether, taking the facts in the light most favorable to [plaintiff], the TILA disclosures were clear and conspicuous to an ordinary consumer"), *Rand Corp. v. Yer Song Moua*, 559 F.3d 842, 847 (8th Cir. 2009) (test is whether "the average borrower would be confused.")

The case law from other circuits cited by Petitioner analyzing TILA, and discussed in detail below, demonstrates that this approach to the "clear and conspicuous" analysis of Regulation Z is consistent with other circuits, and that an APR disclosure under Regulation Z that is inconsistent with the credit card issuer's contractual language can constitute a TILA violation. 12 C.F.R. § 226.5(c); *Rossman v. Fleet Bank (R.I.)*, 280 F.3d 384, 390 (3d Cir. 2002).

Second, Petitioner contends that review is warranted because the Ninth Circuit's decision purportedly improperly creates retroactive liability for its conduct. Petitioner contends that the conduct at issue here was not governed by Regulation Z at the time of the actions complained of but is now governed by a 2009 amendment to Regulation Z. That interpretation of the Ninth Circuit's decision, however, is contrary to both prior case law and the Ninth Circuit's explicit holding.

As far back as 2003, and prior to the issuance of the solicitation at issue here, the Third Circuit had already found in *Roberts*, 342 F.3d at 260, that the use of the word "fixed" to describe an APR that could be changed at will by the card issuer could be a violation of TILA and Regulation Z. In circumstances very similar to the instant case, the Third Circuit held that the district court's holding that a solicitation by Fleet Bank which promoted a "fixed 7.99% APR," where the card issuer reserved the right to change the rate for any reason, could not be, as a matter of law, misleading, was in error. *Roberts*, 342

F.3d at 260, 268-69. The Third Circuit reversed the district court's grant of summary judgment, holding that the claims of a fixed APR could "cause a reasonable consumer to be confused about the temporal quality of the offer." *Roberts*, 342 F.3d at 268. Thus, contrary to Petitioner's argument, there is nothing "retroactive" about the Ninth Circuit's interpretation of TILA and Regulation Z to the facts of this case, as the Third Circuit had already held TILA and Regulation Z to apply to factually similar circumstances as far back as 2003.

Further, the explicit holding of the Ninth Circuit, which thoroughly considered the very issue of retroactivity raised by Petitioner, explicitly held that "[o]ur decision does not make the Board's new regulation retroactive . . . TILA has *always* prohibited misleading APR disclosures. Our holding is simply a concrete application of that prohibition." *Rubio*, 613 F.3d at 1202. Petitioner's argument as to retroactivity is meritless and does not warrant this Court's review.

Petitioner's reliance on this Court's decision in *Chase Bank USA, N.A. v. McCoy*, 562 U.S. ___, 131 S. Ct. 871 (Jan. 24, 2011), to support its retroactivity argument is inapposite. The decision in *McCoy* was based on a specific and unique circumstance, namely, the filing of an *amicus* brief by the Federal Reserve Board ("Board") which *specifically held* that the underlying regulation at issue in *McCoy*, as written at the time of the incident, *did not prohibit* the conduct complained of by respondent in that case. *McCoy*, 562 U.S. ___. Here, where no such contrary

interpretation by the Board exists and, in fact, the Third Circuit's *Roberts* decision had already found that Regulation Z, as then written, applied to these facts as far back as 2003, *McCoy* is inapplicable.

Finally, having no other argument to stand on, Petitioner argues that review should be granted because Capital One, and potentially other credit card issuers who made similar disclosures in the past, could be held liable for substantial damages. That is simply not a reason for review. If such an analysis was a proper reason for review, *any* decision by a federal appeals court that subjected a defendant to significant liability due to wrongful conduct would warrant review. Further, as noted above, Petitioner and other issuers were on notice as far back as 2003 that the use of the word "fixed" in this context could be a violation of TILA and Regulation Z due to the Third Circuit's decision in *Roberts*. There is simply no excuse for Petitioner or other card issuers to now claim to be surprised by a consistent decision by the Ninth Circuit.

Because the decision of the court of appeals is correct and the supposed conflict amongst the circuits is illusory, this Court's review is not warranted.

STATEMENT

A. TILA Background and Statutory Purpose

TILA was enacted in 1968 as Title I (Consumer Credit Cost Disclosure) of the federal Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146 (1968), and has been amended several times. TILA's statutory purpose, specifically stated in its introduction, is as follows:

> to assure meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601(a) (2000); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) (the "purpose of the TILA is to promote the 'informed use of credit' by consumers.")

Put another way, because "consumers were being inundated with credit card solicitations that failed to disclose basic cost information about the cards being promoted," Congress enacted TILA to ensure that consumers of credit services can engage in significant comparison shopping by comparing credit terms more readily and knowledgeably than they otherwise would be able to do. *Roberts*, 342 F.3d at 265.

B. The Specific TILA and Regulation Z Provisions at Issue in Respondent's TILA Claim

In 2004, the sections of TILA and its supporting Regulation Z which governed open ended consumer credit plans mandated that any credit information required to be disclosed by TILA "be disclosed clearly and conspicuously." 15 U.S.C. § 1632(a). TILA and Regulation Z mandated that card issuers, in a credit card solicitation, must disclose the APR that would govern the credit transactions being offered, that such disclosure must be made in "a prominent location" on the solicitation, and that it must be in a "tabular format." 15 U.S.C. §§ 1632(c), 1637(c), 1637(c)(1)(A)(i); 12 C.F.R. §§ 226.5a(a)(2), 226.5a(b)(1). The table described in section 226.5a of Regulation Z, which was required to contain the APR disclosure "clearly and conspicuously," is commonly referred to as a "Schumer Box." *See Roberts*, 342 F.3d at 263. Regulation Z also specifically provided that the APR disclosure in a credit card solicitation "shall reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c).

The Official Staff Commentary for Regulation Z, as articulated by the Federal Reserve Board, as it existed in 2004, elaborated on the nature of the "clear and conspicuous" standard for disclosures that TILA required in solicitations for credit card services, stating that the "clear and conspicuous standard requires that disclosures be in a reasonably understandable form and readily noticeable to the consumer."

Truth In Lending Act, Official Staff Commentary, 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1. Therefore, based on the statutory provisions, regulations, and Official Staff Commentary of TILA as they existed in 2004, the time of the conduct alleged in this matter, it is clear that the APR disclosure contained in a credit card solicitation was required to be made in a "Schumer Box," in a "clear and conspicuous" manner, in a form "reasonably understandable" to a potential credit card consumer, and in a form which "reflect[ed] the terms of the legal obligations between the parties." 15 U.S.C. §§ 1632(a), 1637(c); 12 C.F.R. §§ 226.5(a)(1), 226.5(c), 226.5a; 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1.

Based on these specific elements of TILA, Regulation Z, and the Board's commentary, the Ninth Circuit properly found that it was a violation of TILA for Capital One to disclose in a Schumer Box a "fixed" APR on the credit card it was offering Ms. Rubio, along with three specific conditions where such APR was subject to change, when, according to Capital One, it had actually reserved the right to change the APR for any reason or no reason at all. *See Rubio*, 613 F.3d at 1202.

C. Petitioner's Discussion of Contract Law in the Petition Is Irrelevant

Respondent's breach of contract claim was dismissed by the district court and such dismissal was affirmed by the Ninth Circuit. It is not at issue here.

Yet, in its petition, Capital One proclaims that the "substance of the credit card offers and agreements . . . are governed not by TILA, but primarily by state lending and contract law" (Petition at 4) and then discusses at length the "three distinct means by which credit card issuers may change the interest rate that they charge the credit card holder." (Petition at 4-7). All of the contract law that Petitioner cites to governs what credit card issuers may do to raise an APR *once the customer has entered into a contractual relationship with the issuer.* This is completely irrelevant to Respondent's TILA claim, which deals with disclosure requirements *prior to* entering into such contractual relationship.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT "CONFLICT" SET FORTH BY PETITIONER IS ILLUSORY

Petitioner claims that there is a "three-way conflict" in the circuit courts "regarding the meaning of the clear and conspicuous disclosure requirement" in TILA, which Petitioner claims is somehow "deepen[ed]" by the Ninth Circuit's decision. (Petition at 17). In support of this proposition, Petitioner discusses a number of decisions from the Seventh Circuit, in addition to decisions from other circuit courts, including the First, Second, Fifth, Tenth, and Eleventh Circuits, all of which analyze various types of alleged financial disclosure violations. A close review of the

case law from other circuits cited by Petitioner for the proposition that a "conflict" exists, however, demonstrates that the majority of these cases do not even discuss the appropriate statutory provisions, and of the few that do, they actually *support* the Ninth Circuit's reasoning below.

The specific analysis that was before the court of appeals involved the requirement contained in TILA which mandates that credit card issuers disclose the APR on a credit card being offered to a potential consumer, inside a credit card solicitation's "Schumer Box" section, in a "clear and conspicuous" manner, and, therefore, in a "reasonably understandable form." 15 U.S.C. § 1637(c); 15 U.S.C. § 1632(a); 12 C.F.R. § 226.5(a)(1); 12 C.F.R. § 226.5a; 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1. This requirement was mandated by the versions of TILA, Regulation Z, and the Official Staff Commentary as they existed in 2004. In fact, Petitioner *itself* described this as the issue that was before the court of appeals below.[3] There are only two circuit courts that have addressed this specific issue, the Ninth Circuit and the Third Circuit. Both circuits have come to the identical conclusion, that the use of the word "fixed" in the

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[3] Petitioner states that the issue in this case involves the requirement "that a credit card issuer must 'clearly and conspicuously' disclose certain information in a credit card solicitation 'in accordance with regulations of the [Federal Reserve] Board. 15 U.S.C § 1632(a) The Board's Official Staff Commentary provides that a disclosure is 'clear' when it is in a 'reasonably understandable form.'" (*See* Petition at "Question Presented").

Schumer Box to describe an APR that can be changed at will by the card issuer is not "clear and conspicuous" as a matter of law and may, therefore, violate TILA and Regulation Z. *See Rubio*, 613 F.3d at 1200; *Roberts*, 342 F.3d at 269.

Thus, in order to manufacture a "conflict" between circuits, Petitioner had to go far beyond the specific regulation at issue and instead, search the circuits for any cases that reference "clear and conspicuous" regardless of context, and regardless of when they were decided. In conducting such a search, Petitioner was able to locate a handful of cases that appear, at first glance, to create a conflict. A detailed analysis of those cases, however, shows that the conflict manufactured by Petitioner is illusory.

A. The Seventh Circuit

Courts in the Seventh Circuit have stated that the "legal standard under the Truth in Lending Act is the objective 'reasonable person' approach." *Smith v. Check-N-Go of Illinois*, 200 F.3d 511, 514-15 (7th Cir. 1999). For this reason, in the Seventh Circuit, as in the other circuits, the "'sufficiency of TILA-mandated disclosures'" is to be viewed "'from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor.'" *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803, 806 (7th Cir. 2001) (*quoting Smith v. Cash Store Mgmt., Inc.*, 193 F.3d 325, 327-28 (7th Cir. 1999)). The Seventh Circuit specifically stated in the matter of

Smith v. No. 2 Galesburg Crown Finance Corp., 615 F.2d 407 (7th Cir. 1980) (rev'd in other parts on other grounds, *Pridegon v. Gates Credit Union*, 683 F.2d 182, 193-94 (7th Cir. 1982)), that a TILA violation had occurred because "in the process of comparing terms, [if] a consumer finds some simple interest loan disclosures given only in estimated figures, confusion is bound to result." *Id.* at 417-18. Therefore, in the Seventh Circuit, just like in *Rubio*, a TILA disclosure that may create confusion in a potential consumer with respect to terms of the credit being offered has been found to be a violation of TILA. *Id.*

Petitioner, either ignoring or misinterpreting the cases cited above, contends that, in "stark contrast to the decision below, the Seventh Circuit has held for more than 30 years that TILA's requirement of 'clear and conspicuous' disclosure addresses only the *legibility* of the disclosure and not its understandability." (Petition at 17) (emphasis in original). The case law that Petitioner sets forth for this proposition, however, demonstrates that the "clear and conspicuous" analysis in the Seventh Circuit is actually *not* limited to issues of legibility at all. In fact, Petitioner attempts to simply disregard in a footnote reference a case that even Petitioner concedes specifically articulates that "understandability" is a part of the "clear and conspicuous" analysis in the Seventh Circuit.[4]

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[4] Petitioner concedes at page 19, footnote 6 of the petition that "[i]n *Lifanda v Elmhurst Dodge, Inc*., 237 F.3d 803 (7th Cir. 2001), the court of appeals treated 'clear' as relating to understandability."

Capital One first cites to the matter of *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d at 418, decided more than 30 years ago, where the Seventh Circuit held that the specific TILA disclosure in that case, which involved a finance charge, was not clear because it was not legible. One of the TILA claims in the *Smith* matter was brought by debtors who claimed that a finance charge was not properly disclosed because it was "obscured behind printed words and lines in the form as to be illegible." *Id.* at 415. In analyzing this specific claim, the *Smith* court unremarkably held that the finance charge disclosure in that case was a TILA violation because it was, "in [the court's] opinion, unreadable." *Id.* at 418. Nothing in the decision states that the "clear and conspicuous" disclosure requirement is *limited* to issues of legibility.

In a separate holding concerning the adequacy of finance charge disclosures however, a section of the decision Petitioner ignores, the *Smith* court further determined that the finance charges at issue violated TILA's disclosure requirements because they could be misleading to a potential consumer. *Id.* at 417-18. In *that* part of its opinion, the *Smith* court specifically found a TILA violation, stating that "an unsophisticated debtor might well have difficulty in comparing two forms, one using the required terminology and the other using the terminology found here." *Id.* at 417. Thus, the *Smith* court held that a TILA violation had occurred based on the notion that if "in the process of comparing terms, a consumer finds some simple interest loan disclosures given only in estimated

figures, confusion is bound to result." *Id.* at 418. In direct contrast to Petitioner's contentions, even the very first case it cites from the Seventh Circuit demonstrates that the "clear and conspicuous" standard for TILA disclosures in the Seventh Circuit is analyzed based on the understandability of the disclosure.

The next decision Petitioner discusses is *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996). The claims of plaintiffs in *Channell* were brought under the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e ("CLA") and its supporting regulation, known as Regulation M, 12 C.F.R. § 213.4(a)(1). The *Channell* court started its analysis by finding that the CLA "and Regulation M do not define 'clear and conspicuous.'" *Channell*, 89 F.3d at 382. In contrast, the Official Staff Commentary to TILA's Regulation Z, which is at issue here, specifically states that "a disclosure is 'clear' when it is in a 'reasonably understandable form.'" 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1. Thus, the discussion and holding in *Channell* is simply inapplicable to any discussion of a circuit conflict related to the statutes and regulations at issue here.[5]

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[5] Petitioner also cites to *Jordan v. Toyota Motor Corp.*, 236 F.3d 866, 867 (7th Cir. 2001), which refused to overrule *Channell* on issues related to the Consumer Leasing Act. For the same reasons as *Channell*, the analysis in *Jordan* is equally inapplicable.

Petitioner next discusses *Smith v. Check-N-Go of Illinois*, 200 F.3d 511 (7th Cir. 1999), which involved claims by debtors who had taken out "payday loans" from a lender. The debtors claimed that the disclosures made by the lender violated a specific TILA provision that provides that "the finance charge and annual percentage rate be 'more conspicuous than any other disclosure, except the creditor's identity.'" *Id.* at 513. The analysis of the *Smith* court, therefore, involved the issue of the *conspicuousness* of the TILA disclosures under 12 C.F.R. § 226.17.[6] *See Smith*, 200 F.3d at 513. Again, unremarkably, where the Seventh Circuit found the disclosure to be insufficiently conspicuous, it never had to reach the question of whether or not such disclosure was understandable to a reasonable consumer.

Petitioner finally cites to *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 723 (7th Cir. 2004), which involved claims by a plaintiff under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, a completely different statutory scheme from TILA. The specific issue in *Cole* was whether statutorily mandated language was disclosed in a sufficiently conspicuous manner. *Cole*,

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[6] Petitioner repeatedly discusses several circuit court cases which involve *only* the "conspicuous" requirement to purportedly demonstrate a "conflict" with *Rubio*, despite also taking the position in its petition that Rubio failed to make a claim that the disclosures in her instance were not "conspicuous." *See* Petition at 13, fn. 5 (where Capital One contends that "Respondent did not argue that the *disclosure* was not conspicuous") (emphasis added).

389 F.3d at 729. Since the specific language at issue was statutorily mandated, again, unremarkably, the court in *Cole* never had to address, and, in fact, could not address, whether such language could be misleading. *Cole*, 389 F.3d at 731.

B. Petitioner Disregards the Seventh Circuit's Decision in *Lifanda v. Elmhurst Dodge, Inc.*

Petitioner's argument that Seventh Circuit case law somehow demonstrates a circuit "conflict" on the analysis of TILA's "clear and conspicuous" disclosure requirement cursorily refers to the matter of *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803 (7th Cir. 2001) in a footnote, and fully admits that the Seventh Circuit in *Lifanda* "treated 'clear' as relating to understandability." (Petition at 19, fn. 6) It then attempts to dismiss the *Lifanda* holding by claiming it has not been followed by any other Seventh Circuit case and that it purportedly fails to address the other Seventh Circuit holdings discussed by Petitioner.

First, the *Lifanda* decision was cited with approval by the *only* Seventh Circuit case cited by Petitioner that was decided *after Lifanda*, namely, *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 723 (7th Cir. 2004). Although the *Cole* court did not cite to *Lifanda* for the particular point of law at issue here, certainly in the ten years that have passed since *Lifanda* was decided, the Seventh Circuit has had opportunity to overrule it if it believed it was wrongly decided.

Petitioner points to no decision that has done so. Second, as discussed above, *Lifanda* did not need to distinguish any prior contrary authority in the Seventh Circuit, because there was none. The cases cited to by Petitioner are either inapplicable, or actually support the *Lifanda* analysis.

Obviously, the approach of the Seventh Circuit in *Lifanda*, only described briefly by Capital One in a footnote, blatantly contradicts the very foundation of Petitioner's circuit "conflict" argument – that the "clear and conspicuous" analysis in the Seventh Circuit deals "only" with legibility. (Petition at 19, fn. 6) This is simply not true, as evidenced by *Lifanda*, and the other decisions discussed above.

C. Cases from Other Circuit Courts Cited by Petitioner Similarly Do Not Show the Existence of a "Conflict" Between Circuits

Unlike Petitioner's completely erroneous argument with respect to the holding of the Seventh Circuit, Petitioner acknowledges that the First, Second, Fifth, Tenth, and Eleventh Circuits have analyzed TILA disclosure claims based on whether the disclosures are understandable, as did the Court in *Rubio*. (*See* Petition at 19) However, Petitioner then manufactures a new supposed distinction between the *Rubio* decision and opinions from those other circuits, claiming (without citation) that the Ninth Circuit in *Rubio* held that "*any* ambiguity

constitutes a violation of TILA," while "a majority of [other] courts hold that, so long as a disclosure is 'reasonably' or 'sufficiently' clear, that suffices to meet the clear and conspicuous requirement." (Petition at 19-20) This contention misstates the holding below.

What the Ninth Circuit *actually* said, citing to the Seventh Circuit's decision in *Lifanda*, 237 F.3d at 808, its own prior decision in *Jackson v. Grant*, 890 F.2d 118, 120 (9th Cir. 1989), and the Third Circuit's decision in *Rossman*, 280 F.3d at 394, is that, at the motion to dismiss stage, "any *misleading* ambiguity – any disclosure that a reasonable person could read to mean something that is not accurate – 'should be resolved in favor of the consumer.'" *Rubio*, 613 F.3d at 1202 (*quoting Rossman*, 280 F.3d at 394) (emphasis added). Thus, the Ninth Circuit's decision is fully in line with the decisions of every other circuit, namely, that a disclosure that a reasonable person could read to mean something that is not accurate, i.e., a confusing disclosure, or one which is so ambiguous that it would cause a reasonable person to be misled, cannot be held to be a clear and conspicuous disclosure as a matter of law. Neither the Ninth Circuit in this case, nor any other circuit, requires "perfect notice" as Petitioner contends. What the Ninth Circuit held, in line with every other circuit, is that where a notice is so ambiguous as to be misleading, it cannot be held to be clear and conspicuous as a matter of law.

In an attempt to manufacture this conflict, Petitioner has browsed through the TILA decisions from different circuit courts spanning almost 40

years, pulled out various statements describing TILA's "clear and conspicuous" language from the decisions of those courts, and pieced together statements that Petitioner contends represent conflicts with the Ninth Circuit. These vague distinctions between the language in different TILA decisions amounts to nothing more than minor nuances that *always* exist in the language of opinions from different courts, whether from the same or different circuits. If such nuances of language actually represented a circuit conflict, this Court would have a never-ending workload "resolving" such circuit conflicts.

1. First Circuit

Petitioner cites to two decisions from the First Circuit, both of which involve issues of notice of rescission rights involved in mortgage lending under 15 U.S.C. § 1635(a) and 12 C.F.R. § 226.23, and the "clear and conspicuous" disclosure analysis therein. (*See* Petition at 20) Petitioner attributes to the First Circuit a statement from *Santos-Rodriguez v. Doral Mortgage Corp.*, 485 F.3d 12, 16 (1st Cir. 2007), that "'[m]ost courts have concluded that TILA's clear and conspicuous standard is less demanding than a requirement of perfect notice.'" (Petition at 20) This analysis is not inconsistent with the decision in *Rubio*, which similarly does not require perfect

notice, but simply requires the notice to be clear enough so as to be not misleading.[7]

A close review of the other decision from the First Circuit cited by Petitioner, *Palmer v. Champion Mortgage*, 465 F.3d 24 (1st Cir. 2006), which also involved the adequacy of notice of rescission rights in mortgage lending under 15 U.S.C. § 1635(a) and 12 C.F.R. § 226.23 and made a similar holding as *Santos-Rodriguez*, perfectly demonstrates how the law on the adequacy of TILA disclosures in the First Circuit is entirely in line with *Rubio*, and with that of other circuits. Specifically, the *Palmer* court stated that TILA places an

> emphasis on objective reasonableness, rather than subjective understanding, [which] is also appropriate in light of the sound tenet that courts must evaluate the adequacy of TILA disclosures from the vantage point of a hypothetical average consumer – a consumer who is neither particularly sophisticated nor particularly dense. *See Smith v. Cash Store Mgmt., Inc.*, 195 F.3d 325, 327-328 (7th Cir. 1999) (explaining that TILA disclosures should be viewed from the perspective of an

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[7] Other First Circuit decisions have emphasized that "even without an explicit statutory provision, courts have interpreted TILA to prohibit misleading statements, holding that 'a misleading disclosure is as much a violation of TILA as a failure to disclose at all'" *Barnes v Fleet National Bank, N A.*, 370 F.3d 164, 174 (1st Cir 2004), *quoting Smith v. Chapman*, 614 F 2d 968, 977 (5th Cir 1980)

> ordinary consumer, not a federal judge); *see also Edmondson v. Allen-Russell Ford, Inc.*, 577 F.2d 291, 296 (5th Cir. 1978) ("We must assess the adequacy of disclosure . . . by the audience for which disclosure was intended.") Thus, we turn to the question of *whether the average consumer, looking at the Notice objectively, would find it confusing*.

Palmer, 465 F.3d at 28 (emphasis added). Based on the above, the approach of the First Circuit to the "clear and conspicuous" disclosure analysis is entirely consistent with – and actually supports – the reasoning behind the decision in *Rubio*, namely, that a notice that a reasonable consumer would find confusing cannot, as a matter of law, be clear and conspicuous.

2. Eleventh Circuit

The Eleventh Circuit decision cited by Petitioner, *Veale v. Citibank, F.S.B.*, 85 F.3d 577, 580 (11th Cir. 1996), like the cases from the First Circuit, also involved an analysis of whether notice of rescission rights in the mortgage lending context was adequate under TILA and Regulation Z, 12 C.F.R. § 226.1, *et seq*. Petitioner cites to language from that decision holding that a disclosure that was "reasonably clear when applied to the particular facts involved in this case" met the clear and conspicuous disclosure requirement because it "provides sufficient notice." (Petition at 20) This wholly unremarkable proposition, applied to the specific finding of that case, namely, that provision of an H-8 form notice was

sufficient disclosure of rescission rights as to the second-mortgage transaction, in the context of a second-mortgage only financing, where it failed to specify that there was no right to rescind the original mortgage.[8] *See Veale*, 85 F.3d at 580. There is nothing about that specific holding related to the facts of that case that conflicts with the Ninth Circuit's holding in the instant case.

3. Second and Sixth Circuits

Petitioner initially cites to language from *Gambardella v. G. Fox & Co.*, 716 F.2d 104, 118 (2d Cir. 1983), where the Second Circuit stated that a "disclosure that 'requires the consumer to exercise some degree of care and study' to understand it suffices to meet TILA's clear and conspicuous requirement."[9]

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[8] As Capital One points out, a Third Circuit case cited in the petition, *Porter v Mid-Penn Consumer Discount Co*, 961 F.2d 1066, 1076 (3d Cir. 1992), held differently than the *Veale* court with respect to whether the specific form containing the notice of rescission rights in those cases adequately disclosed the borrower's rescission rights. (Petition at 20). However, these courts applied the same standard to the specific analysis of rescission rights under 12 C.F.R § 226.1 They simply arrived at different conclusions with regard to a close question

[9] The *Gambardella* case was decided in 1983 under truth in lending laws from the state of Connecticut, and referred to the versions of TILA and Regulation Z in existence prior to the 1980 TILA amendments. *See Gambardella*, 716 F2d at 106 As a result, the specific TILA requirement at issue in *Rubio*, that APR disclosures be made "clearly and conspicuously" in a credit card solicitation's "Schumer Box" was not yet in existence, as it

(Continued on following page)

(Petition at 21) Petitioner fails to cite to the immediately following language, however, which clarifies this statement: "TILA, however, does not require perfect disclosure, but only disclosure which clearly reveals to consumers the cost of credit. *See Dixon v. D.H. Holmes Co.*, 566 F.2d 571 (5th Cir. 1978). Because the statements G. Fox sent Connecticut consumers, read as a whole, clearly disclosed periodic and annual rates, the imperfections in format did not violate the law." *Gambardella*, 716 F.2d at 118. Again, there is nothing remarkable about the Second Circuit's language which would lead to a different result in *Rubio*.

Petitioner also cites to an additional Second Circuit decision, *Lundquist v. Security Pacific Automotive Financial Servs. Corp.*, 993 F.2d 11 (2d Cir.) (*per curiam*), *cert. denied*, 510 U.S. 959 (1993), for the proposition that "a disclosure will not meet the clear and conspicuous requirement when it is 'beyond the understanding of the average consumer.'" (Petition at 21) The full quote, in context, reads as follows:

> we agree with the district court that the Security Pacific lease disclosures are not reasonably understandable. They are "confusing, unduly complicated, and unnecessarily convoluted." In particular, the termination formula in Item 16(c) of the lease is a Byzantine formula, beyond the understanding of the average consumer.

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was not implemented as part of TILA and Regulation Z *until 1988*. *Roberts*, 342 F.3d at 263

Lundquist, 993 F.2d at 15. Again, there is nothing remarkable about the Second Circuit's decision. It does not hold that disclosures can be misleading *only* if they are "beyond the understanding of the average consumer," only that the particular disclosure at issue was so. In fact, the Second Circuit affirms the same "reasonably understandable" standard applied by the Ninth Circuit in the instant case. *Lundquist*, 993 F.2d at 15.

Petitioner then cites to *Burton v. Public Fin. Corp. of Akron*, 657 F.2d 842 (6th Cir. 1981), a *per curiam* decision, as holding that a "disclosure not clear [sic] when it 'borders on the incomprehensible.'"[10] (Petition at 21) Again, Petitioner takes this quote out of context. In finding that a particular disclosure violates TILA, the Sixth Circuit held "[t]his clause is not 'clear,' it borders on the incomprehensible. Complex accounting terms and confusing syntax are used to obscure the meaning of this clause, not to explain its terms." *Burton*, 657 F.2d at 843. Thus, it is not the holding of the Sixth Circuit that a statement *has to be* incomprehensible in order to violate TILA, just that the statement in that particular case *was* incomprehensible.

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[10] Like *Gambardella*, this decision was rendered prior to revisions of TILA and Regulation Z which added the "clear and conspicuous" APR disclosure standard in 1988

4. Fifth and Tenth Circuits

Petitioner contends that the Fifth Circuit case of *Dixon v. D.H. Holmes Co.*, 566 F.2d 571 (5th Cir. 1978) (*per curiam*), again decided before the 1988 revision to TILA and Regulation Z at issue here was in effect, is "in tension" with the *Rubio* holding because, according to Petitioner, the case shows that Fifth Circuit courts have held that "clarity can be achieved even if there are clearer ways of conveying the information." (Petition at 21) The specific statement that Capital One cites from the *Dixon* opinion is that the "'question is not whether something is capable of semantic improvement, but whether it contains a substantial and accurate disclosure.'" (Petition at 21) There is nothing inconsistent about this holding and the holding of the Ninth Circuit. In fact, it tracks the Ninth Circuit language which held that a disclosure is misleading where "a reasonable person could read [it] to mean something that is not accurate." *Rubio*, 613 F.3d at 1202.

Petitioner finally cites to the Tenth Circuit decision in *Scofield v. Telecable of Overland Park*, 973 F.2d 874 (10th Cir. 1992) and references statements from that decision which it also contends are "in tension" with *Rubio*. (Petition at 21) Again, however, the statements cited are simply different ways of stating the same standard. For example, Petitioner states that in the Tenth Circuit, the "question is what 'the average subscriber will likely understand.'" (Petition at 22). The language is essentially the same as that used in every other circuit, with the Tenth

Circuit using the word "likely" in place of "reasonably."

Based on the above, there simply is no "conflict" among the circuit courts that needs resolution with respect to the truth in lending issues raised in this matter. Further, Petitioner even admits that these decisions of the First, Second, Fifth, Tenth and Eleventh circuits "appear to be consistent with the Federal Reserve Board's Official Staff Commentary." (Petition at 22). Similarly, as Petitioner reluctantly concedes in a footnote, it is also clear that the Seventh Circuit, as evidenced by its decision in *Lifanda*, is consistent with the other circuits and Official Staff Commentary.

Given this admission, Petitioner's contention, then, that the Ninth Circuit's decision below represents a circuit conflict is even more puzzling, as the Ninth Circuit specifically cites to that very same Staff Commentary as the basis for its decision. *See Rubio*, 613 F.3d at 1200 (holding that "[t]his disclosure must be clear and conspicuous, . . . which, for purposes of credit card solicitations, *is defined in the official staff commentary to Regulation Z* as 'in a reasonably understandable form and readily noticeable to the consumer.'" (*citing* 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1; *Barrer v. Chase Bank USA, N.A.*, 566 F.3d 883, 887 & n.4 (9th Cir. 2009) (noting that the official staff commentary is owed deference)) (emphasis added).

5. Third Circuit

Petitioner's hair-splitting becomes clear, however, when it attempts to distinguish the Third Circuit decisions from the remaining circuits, namely, it contends that the Ninth Circuit in this case, and the Third Circuit in other cases, have invented a new standard under TILA requiring "perfect disclosure in order for [the disclosure] to be clear and conspicuous." (Petition at 23). That, however, is simply not the case. In support of its theory, it cites to *Porter v. Mid-Penn Consumer Discount Co.*, 961 F.2d 1066, 1076 (3d Cir. 1992) for the proposition that the Third Circuit requires perfect disclosure. It completely ignores, however, the very language of the case it cites, which explicitly holds that "the law *does not require an ideal notice* of rescission rights, just a clear, accurate, and conspicuous one. To determine whether the notice that Porter did receive was *confusing or misleading*, we have no choice but to embark on a close reading of that notice." *Id.* (emphasis added). Similarly, it cites to *Rossman v. Fleet Bank (R.I.) N.A.*, 280 F.3d 384 (3d Cir. 2002), but ignores the factual discussion prior to the quote:

> For we believe a reasonable consumer would, at any rate, be entitled to assume upon reading Fleet's solicitation that the issuer was committed to refraining from imposing an annual fee for at least one year. The statement "no annual fee," in other words, is fairly understood to contain an implied term of a year. If Fleet had imposed an "annual fee" of

> twenty dollars upon the opening of Rossman's account, she would have been entitled to expect that, upon payment of that fee, she would be entitled to a year's use of the card, assuming her other obligations were met. Thus, had Fleet imposed another "annual fee" of thirty-five dollars mid-year, she would surely have been deceived. The original twenty-dollar fee would then not be an *annual* fee, but simply a fee. Similarly, a reasonable consumer could understand the statement "no annual fee" as describing a promise of (at least) a fee-free year. It would follow that Rossman's credit card was not a no-annual-fee card unless no such fee would be charged for a year. Consequently, Fleet's statement to the contrary would be false or misleading for purposes of the TILA.

Rossman, 280 F.3d at 394.

The primary problem with Petitioner's argument that language differences of this type in opinions from various circuits are "conflicts" and create a circuit conflict in need of resolution by this Court is that interpretation of TILA and Regulation Z is, necessarily, a fact specific and somewhat nuanced inquiry. Thus, each court, writing each opinion, may phrase the exact query in a slightly different manner, sometimes referring to it as "likely," sometimes "reasonably," sometimes "plausibly," sometimes "clearly." These terms are all, however, effectively interchangeable. Each circuit that has looked at this issue since the issuance of the Official Staff Commentary on

Regulation Z has followed the Staff Commentary. There is no circuit conflict in need of resolution by this Court, and Petitioner's argument that the decision by the Ninth Circuit below is in "conflict" with the decisions of other circuits is simply wrong.

II. *RUBIO* DOES NOT CREATE ANY "RETROACTIVE LIABILITY"

Petitioner contends that the Ninth Circuit's decision below somehow subjects it to "retroactive liability" for the contents of the credit card solicitation it sent to Rubio in 2004, and that the decision therefore warrants review by this Court. (*See*, *e.g.*, Petition at 2). The basis for this contention appears to be Capital One's erroneous suggestion that the *Rubio* court used the Board's 2009 amendment to Regulation Z to determine "what the pre-2009 Regulation Z required." (Petition at 24). That is simply not the case.

First, Petitioner completely ignores the 2003 decision from the Third Circuit in *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260 (3d Cir. 2003). In *Roberts*, decided prior to any of the actions complained of here, and under similar factual circumstances, the Third Circuit held that a card issuer's advertising of a "fixed" APR could constitute a violation of TILA and Regulation Z where the card-issuer reserved the right to raise the APR at will. *Roberts*, 342 F.3d at 260. More specifically, in *Roberts*, Fleet Bank sent an offer to plaintiff Roberts promoting a "fixed 7.99% APR." *Roberts*, 342 F.3d at 268. Just like Capital One did to

Respondent, subsequent to plaintiff Roberts opening a credit card account with Fleet Bank based on the offer and its advertisement of a "fixed" APR, Fleet Bank sent a letter stating that it was increasing the "fixed" APR to 10.5%. *Roberts*, 342 F.3d at 268.

Plaintiff Roberts asserted causes of action against Fleet Bank, including a violation of TILA, for advertising a "fixed" APR in its offer, and then subsequently increasing the APR on the credit card. The Third Circuit analyzed plaintiff Roberts' TILA claims and the solicitation Fleet Bank sent to her, and held that there was a triable issue of fact, at the summary judgment stage, as to whether the materials Fleet Bank sent to Roberts were misleading and therefore a violation of TILA's "clear and conspicuous" disclosure requirement. *Roberts*, 342 F.3d at 260. Specifically, the Third Circuit in *Roberts* stated that:

> Because the purpose of the TILA is to assure meaningful disclosures, "the issuer must not only disclose the required terms, it must do so accurately." *Rossman v. Fleet Bank (R.I.) Nat'l Ass'n,* 280 F.3d 384, 390-91 (3d Cir. 2002). "The accuracy demanded excludes not only literal falsities, but also misleading statements." *Id.* (citing *Gennuso v. Commercial Bank & Trust Co.,* 566 F.2d 437, 443 (3d Cir. 1977)).

Roberts, 342 F.3d at 266. Thus, the *Roberts* court found that it could be misleading and in violation of TILA for a credit card issuer to advertise a "fixed" APR with only two possible avenues for increase

listed in the Schumer Box when, in fact, according to the issuing bank, the APR was actually subject to change for any reason whatsoever. *Roberts*, 342 F.3d at 266.

Thus, as far back as 2003, and prior to the specific solicitation at issue here, Petitioner, and other card issuers, were on notice that the use of the word "fixed" to describe an APR that was subject to change at will could be held to violate TILA and Regulation Z. The Ninth Circuit in this case essentially echoed the findings of the Third Circuit in 2003. Thus, for Petitioner to argue that the only way the Ninth Circuit could have interpreted TILA and Regulation Z to apply in this instance is by a retroactive application of a 2009 amendment to Regulation Z is pure fantasy.

Respondent brought her claims against Petitioner based on specific provisions in TILA and Regulation Z that governed Petitioner's conduct at the time of those claims, and well within the statute of limitations for such claims. In fact, at the time that Ms. Rubio brought her initial complaint in October 2007, even drafts of the 2009 amendments to Regulation Z were not promulgated. Thus, both at the time of the solicitation at issue, and at the time the original complaint was filed, Plaintiff was proceeding on the basis of a violation of Regulation Z as then articulated.

As the Ninth Circuit held, "although clarity and conspicuousness is a question of law, empirical evidence is helpful in determining what a reasonable consumer will understand and readily notice." *Rubio*,

613 F.3d at 1200 (citations omitted). Thus, the Ninth Circuit reasonably looked to research done by the Federal Reserve Board related to how a reasonable consumer would interpret the language "fixed rate." *Id.* The Ninth Circuit reasoned "where such persuasive and directly relevant evidence is available, armchair empiricism is comparatively unhelpful in determining how a reasonable consumer will read a solicitation." *Id.*

After reviewing the findings of the Board, the Ninth Circuit found that, as alleged in the Complaint, the term fixed "can *reasonably* be interpreted to mean 'unchangeable'" by a consumer. *Rubio*, 613 F.3d at 1202. Thus, it held, "it is not 'clear and conspicuous' to describe an APR as 'fixed' when the creditor has reserved the right to change the APR for any reason." *Id.*

Further, the Ninth Circuit did not simply avoid discussing the issue presented here by Petitioner. It thoroughly understood that it might be accused, as it is by Petitioner, of retroactive application of the 2009 amendment and it discussed the issue in detail. Specifically, it held that:

> The new regulation did not become effective until after the events giving rise to this litigation, and thus does not bind us. *The form of Regulation Z that governs this case, however, does prohibit disclosures that a reasonable consumer will not understand.* 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1. The new regulation was adopted because the agency that implements TILA, relying on

> empirical evidence, concluded that describing an APR as "fixed" is misleading to reasonable consumers. What was misleading in 2006 and 2007, when the consumer studies were conducted, was also misleading in 2004, when Rubio received Capital One's solicitation.
>
> * * *
>
> Our decision does not make the Board's new regulation retroactive. The Board promulgated its new regulation because, after surveying consumers, it concluded "fixed" was misleading. That is why the new regulation is relevant and helpful: TILA has *always* prohibited misleading APR disclosures. Our holding is simply a concrete application of that prohibition.

Rubio, 613 F.3d at 1201-02 (emphasis added).

Not only did the *Rubio* court make clear that it had not relied on the recent amendment to TILA's regulations in holding that use of the word "fixed" in this context violated TILA Regulation Z, but it also had no need to. The Third Circuit had already found, *six years* before any such amendments were introduced by the Board, that the use of the word "fixed" to describe an APR that was changeable at will was a violation of TILA and Regulation Z as then implemented. *See Roberts*, 342 F.3d at 260.

Petitioner also repeatedly refers to the recent decision of this Court in *Chase Bank USA, N.A. v. McCoy*, 562 U.S. at ___, for the proposition that the *Rubio*

court made the "same error" that was identified in *McCoy*, which Capital One contends is "mistakenly relying on the Board's current regulation in determining 'what the pre-2009 version of Regulation Z required.'" (Petition at 24) For the reasons discussed above, this is factually wrong. Further, even if it were not factually wrong, the *McCoy* decision is inapposite. The decision in *McCoy* was not a general prohibition against the use of future agency statements or actions to interpret agency regulations. Rather, it was based on a very specific, and unique, circumstance. This Court in *McCoy* had the benefit of, and relied upon, an *amicus* filing by the Federal Reserve Board which *specifically found* that the underlying regulation at issue in *McCoy*, as written at the time of the incidents in *McCoy*, *did not prohibit* the conduct complained of by respondent in that case at that time. *McCoy*, 562 U.S. at ___. Here, no such contrary interpretation by the Board exists, and, in fact, the Third Circuit's *Roberts* decision had already found that Regulation Z, as then written, applied to these facts. *McCoy* is inapplicable.

III. THE NINTH CIRCUIT'S DECISION IS NON-CONTROVERSIAL

Petitioner cites to various articles, including such sources as the websites for the law firms of Foley & Lardner LLP and Styskal, Wiese & Melchonie LLP, for the proposition that the Ninth Circuit's decision herein will result in broad negative consequences. That is simply not the case. As discussed in detail

above, the Ninth Circuit's decision tracks the Third Circuit's 2003 decision in *Roberts*. Card issuers such as Petitioner should have been on notice as far back as 2003 that if they used the word "fixed" to describe an APR, when, in reality, they reserved the right to change that APR for any reason at any time, they may be subject to liability. Thus, contrary to Petitioner's contention, no "*ex post facto*" disclosure obligations are being imposed on lenders through the Ninth Circuit's decision, and no broad negative consequences flow from the decision.

CONCLUSION

For all of these reasons, the Court should deny Capital One's Petition, as there are insufficient grounds to warrant the review requested.

Respectfully submitted,

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